

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 17, 2008 Session

**LANDAIR SURVEYING CO. OF TENN., INC., ET AL. v. KENN DAVIS, ET
AL.**

**Appeal from the Circuit Court for Knox County
No. 2-75-05 Harold Wimberly, Judge**

No. E2008-00299-COA-R3-CV - FILED NOVEMBER 25, 2008

The issues presented in this case involve the enforceability of an oral one-year contract and damages for loss of personal property. Upon careful review of the record and applicable law, we hold the following: 1) that the oral contract between the parties was not enforceable because it violated the statute of frauds, and 2) that the trial court did not err in failing to award the plaintiffs damages for their lost property where the sole testimony evidencing the value of such property was determined by the trial court to be “guesswork.”

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Cause
Remanded**

SHARON G. LEE, Sp. J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Matthew J. Evans and John W. Elder, Knoxville, Tennessee, for the appellants, Landair Surveying Company of Tennessee, Inc., Robert D. Sanders, Jr., and Amy Sanders.

Barbara W. Clark, Knoxville, Tennessee, for the appellee, Kenn Davis, a.k.a. Kenn Davin.

OPINION

I. Background

Robert Sanders, Jr. is a Tennessee licensed surveyor. In 2002, Mr. Sanders and his wife, Amy Sanders, purchased and began operating a surveying company in Knoxville under the name of Landair Surveying Company of Tennessee, Inc. (“Landair”). On October 15, 2003, the Sanderses met with Kenn Davis, a.k.a. Kenn Davin (“Mr. Davin”), a general contractor to whom they had been introduced by a mutual client. At this meeting, Mr. Davin agreed to loan the Sanderses \$16,907.71 to alleviate cash flow problems Landair was experiencing at the time. In addition, the three discussed the possibility of a merger of Landair with a surveying company that Mr. Davin planned to purchase designated Sumner Surveying. It was apparently the parties’ intention to operate these two merged companies as America One Property Services (“America One Property”), that Mr. Sanders be employed by America One Property at a salary of \$63,000 per year, and that Mrs. Sanders be employed as a bookkeeper at a salary of \$12,000 per year.

At some time after the parties’ meeting in October of 2003, Mr. Davin purchased Sumner Surveying, and thereafter, on January 1, 2004, America One Property began business operations in Knoxville, utilizing both the surveying equipment and computers of Landair and the surveying equipment and computers of Sumner Surveying that Mr. Davin had recently purchased. On that same date, Mr. Sanders began employment as the licensed surveyor and manager of America One Property, and Mrs. Sanders began employment as its bookkeeper at the previously noted respective annual salaries of \$63,000 and \$12,000.

In February of 2004, Mr. Davin received information that led him to believe that Mr. Sanders had stolen money from America One Property, and consequently, he barred the Sanderses from the business premises of America One Property and terminated their employment. Thereafter, Landair and the Sanderses filed a complaint against Mr. Davin in the Circuit Court for Knox County. This complaint alleged that Mr. Davin induced the Sanderses to merge Landair with Sumner Surveying resulting in the formation of America One Property, that the Sanderses invested approximately \$65,000 worth of their land surveying equipment in America One Property and devoted their full time and attention to the operation of that business, and that Mr. Davin expelled the Sanderses from America One Property without just cause and converted the assets of Landair to his own exclusive use. The complaint asserted that because of these alleged actions, Mr. Davin breached the parties’ agreement and caused the Sanderses to incur damages for loss of wages and income in the amount of \$75,000, loss of equipment in the amount of \$65,000, and business expenses in the amount of \$15,500. Mr. Davin denied the allegations and countersued the Sanderses for the unpaid loan he had made to them in the amount of \$16,907.71.

Following a bench trial in December of 2007 and January of 2008, the trial court entered judgment finding that there was no employment contract between the Sanderses and Mr. Davin and allowing the Sanderses compensatory damages in the amount of \$16,907.71 for loss of surveying equipment with such amount being offset in full by the outstanding loan debt owed by the Sanderses

to Mr. Davin. The trial court denied the Sanderses' claim for loss of personal property, finding that the computer data related to past surveys performed by Mr. Sanders which was lost after the Sanderses were barred from America One was of zero value. The Sanderses appeal.

II. Issues

1) Whether the trial court erred in ruling that there was no enforceable employment contract between the parties.

2) Whether the trial court erred by failing to award the Sanderses sufficient compensatory damages for lost computer data.

III. Analysis

A. Standard of Review

In a non-jury case such as this one, we review the record de novo with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. ***Seals v. England/Corsair Upholstery Mfg. Co.***, 984 S.W.2d 912, 915 (Tenn. 1999). In regard to the trial court's assessment of witness credibility, the Tennessee Supreme Court has further stated as follows:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary.

Wells v. Tenn. Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted). The trial court's conclusions of law are accorded no presumption of correctness. ***Campbell v. Fla. Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

B. Enforceability of Employment Contract

First, we address the issue of whether the trial court erred in failing to award the Sanderses damages for breach of an alleged employment contract pursuant to which they were granted a combined annual salary of \$75,000 per year as employees of America One Property.

The trial court found that there was no enforceable contract between the Sanderses and Mr.

Davin to justify allowance of their claim for the difference between the annual salaries they were allegedly promised as employees of America One Property and the wages they actually received for the single month they were employed. In this regard, the trial court stated, “Certain things happened but I don’t think that these people ever agreed on anything. So what did happen, the plaintiffs did move over to the defendant’s location, brought some things with them, and then the whole thing fell apart, and the defendant kept certain items of property that were left there.” In reaching its determination, the trial court reasoned that having just purchased Landair, the Sanderses should have known what was required to create a binding legal agreement between themselves and Mr. Davin and although they had attempted to persuade Mr. Davin to enter into a written agreement as was done when they purchased Landair, he never did so. “This, you know should have been a strong indication that there was not actually any agreement there.” We respectfully disagree with the trial court’s reasoning; however, we conclude that the trial court reached the right result.

We begin with the premise that whether “expressed, implied, written, or oral, . . . an enforceable contract must, among other elements, result from a meeting of the minds and must be sufficiently definite to be enforced.” *Rice v. NN, Inc. Ball & Roller Div.*, 210 S.W.3d 536, 543 (Tenn. Ct. App. 2006). We do not dispute that Mr. Davin’s refusal to put the parties’ alleged agreement in writing constituted circumstantial evidence supporting his denial that there was a meeting of minds resulting in the agreement asserted by the Sanderses. And, in the absence of an employment contract of specific duration, Mr. Davin was entitled to fire the Sanderses at his discretion, it being well settled as a general matter that “a contract for employment for an indefinite term is a contract at will and can be terminated by either party at any time without cause.” *Bringle v. Methodist Hosp.*, 701 S.W.2d 622, 625 (Tenn. Ct. App. 1985). *See also Forester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994) (noting that at-will employment may be terminated for “good cause, bad cause, or no cause”). However, Mr. Davin’s testimony at trial constitutes direct evidence that there, in fact, was a meeting of the minds that the Sanderses would be employed under the terms they now assert, that they were paid one month’s wages consistent with such terms, and that, thereafter, they received no additional wages:

Q. . . . You do agree, don’t you, that Rob Sanders became an employee of America One on January 1, 2004, didn’t he?

A. Yes.

Q. And he was being paid sixty-three thousand dollars a year?

A. Yes.

Q. And Amy Sanders was the bookkeeper at America One and she was being paid twelve thousand dollars a year?

A. Yes.

Q. And they got payments for January, didn't they?

A. Yes.

Q. And then after you locked them out of the business on February the 9th they got no further payments, did they?

A. That's correct.

The Tennessee Supreme Court has stated that "a hiring at so much per week, or month, or year, is a hiring for that period, provided there are no circumstances to the contrary." *Delzell v. Pope*, 294 S.W.2d 690, 694 (Tenn. 1956). *See also McCall v. Oldenburg*, 382 S.W.2d 537, 540 (Tenn. Ct. App. 1964); *Chavez v. Broadway Elec. Service Corp.*, 245 S.W.3d 398, 404 (Tenn. Ct. App. 2007). Mr. Davin's above cited admissions that Mr. Sanders was hired at a salary of \$63,000 a year and that Mrs. Sanders was hired at a salary of \$12,000 a year constitute admissions that there was an agreement that they be employed for one year at those salaries, and there being no demonstration of circumstances to the contrary, Mr. Davin is precluded from asserting otherwise.

Mr. Davins argues that any alleged agreement between himself and the Sanderses to employ them for one year is voidable under the statute of frauds, which, in pertinent part, prohibits an action being brought upon a nonwritten agreement that will not be performed in less than one year:

(a) No action shall be brought:

...

(5) Upon any agreement or contract which is not to be performed *within the space of one (1) year from the making of the agreement or contract*; unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party.

Tenn. Code Ann. § 29-2-101(a)(5)(emphasis added). An oral contract subject to the statute of frauds is voidable by either party, and if either party disaffirms such contract, no action thereon for specific performance or damages can be maintained. *Trew v. Ogle*, 767 S.W.2d 662, 664 (Tenn. Ct. App. 1988).

As noted, the verbal agreement entered into by the parties in October of 2003 provided that the Sanderses' employment would begin in the future after Mr. Davin's purchase of Sumner Surveying and accordingly, the agreement is within the statute of frauds. *See Boutwell v. Lewis Bros. Lumber Co.*, 182 S.W.2d 1, 3 (noting that "verbal employment contracts for a year from some

future date are invalid under the statute of frauds”). The Sanderses do not dispute that the verbal contract of employment between themselves and Mr. Davin is a contract that would ordinarily be subject to the statute of frauds, but they contend that it is excepted from operation of the statute pursuant to the equitable doctrine of partial performance. As noted by the Tennessee Supreme Court, a plaintiff seeking to invoke this doctrine

must be able to show such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute [of frauds] to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, so far to alter his position as to incur an unjust and unconscious [sic] injury and loss, in case the defendant is permitted after all to rely upon the statutory defense.

Buice v. Scruggs Equip. Co., 250 S.W.2d 44, 47 (Tenn. 1952).

Our review of the record persuades us that the element of representation that the statute of frauds would not be relied upon was satisfied. The undisputed proof clearly shows that Mr. Davin engaged in conduct showing that he intended to abide by the terms of the employment agreement as it was envisioned by the parties at their meeting on October 15, 2003. Consistent with the parties’ intentions at that time, Mr. Davins purchased Sumner Survey, opened America One Property as a new business utilizing the equipment of Sumner Survey and Landair, and employed the Sanderses at the previously agreed upon provisions as to duration and salary, paying them each one month’s wages consistent with such provisions. We believe that Mr. Davins’ engagement in this conduct in the absence of a written contract created the impression that a written contract would not be a prerequisite to the agreement’s validity. We do not, however, agree that the Sanderses have satisfied that element of the doctrine of partial performance that requires that a plaintiff have altered his or her position so as to incur an unconscionable injury or loss.

Whether there was partial performance of a contract such as will take it out of the statute of frauds must be determined upon the particular facts of the case. ***Foust v. Carney***, 329 S.W.2d 826, 829 (Tenn. 1959). The mere fact that the Sanderses worked for one month before they were fired is insufficient to trigger the doctrine of partial performance for, as we have stated on prior occasion,

the doctrine of part performance does not require merely that the plaintiff performed services under the contract sued upon. The doctrine additionally requires that the plaintiff, in performance or pursuance of the contract, altered his position in such a way that it would be unjust and unconscionable not to enforce the contract.

Lomax v. Jackson-Madison Co., No. 02A01-9706-CH-00116, 1997 WL 33760893, at *2 (Tenn. Ct. App. 1997). The Sanderses argue that they detrimentally altered their position in reliance upon

their agreement with Mr. Davin by moving Landair's surveying equipment and client data to the offices of America One Property and by Mr. Sanders' declination of a job offer with another surveying firm, Allen & Hoshall. We do not agree that either of these actions suffices to except the Sanderses' agreement with Mr. Davin from the statute of frauds. While it may be taken for granted that the Sanderses expended time and energy in moving their equipment and data from their prior leased business location to the premises of America One Property, there is no proof as to the degree of time and energy so expended. In any event, although an employee's relocation from one state to another in reliance upon an employment agreement may be sufficiently detrimental to remove a contract from the statute, *see Blasingame v. American Materials, Inc.*, 654 S.W.2d 659 (Tenn. 1983), in our view, a transfer of some personal property across town is not. In addition, evidence was presented showing that after moving their business equipment and data to America One Property, the Sanderses were able to use newer computers and better surveying equipment that Mr. Davin had bought from Sumner Survey and new computer software that Mr. Davin had purchased at a cost of \$15,000. Therefore, the Sanderses' work environment was improved and at least for the month of their employment, they actually benefitted as a result of the move. As to the Sanderses' allegation that Mr. Sanders declined a job offer from the Allen & Hoshall surveying firm to accept Mr. Davin's offer, Mr. Davin testified that Mr. Sanders, before accepting Mr. Davin's offer, advised him that he did not "think things were going to work out with this other company that was going to hire him." Furthermore, there is nothing in the record to show the specific terms of the alleged offer from Allen & Hoshall and, therefore, no basis for determining what sacrifice, if any, Mr. Sanders made in declining that offer. Absent proof of such terms, any detriment the Sanderses may have suffered in rejecting the offer would be purely a matter of speculation and conjecture and provides no ground for a conclusion as to whether the Sanderses "altered [their] position in such a way that it would be unjust and unconscionable not to enforce the contract."

As we have previously noted, the doctrine of partial performance should be applied with care and balance, and "if the doctrine is too liberally applied, it could easily result in the exception of partial performance swallowing the rule of the Statute of Frauds, and allowing the proliferation of those very evils that the Statute was created to guard against." *Shedd v. Gaylord Entertainment Co.*, 118 S.W.3d 695, 698 (Tenn. Ct. App. 2003). It is our determination that the agreement between Mr. Davin and the Sanderses was not enforceable because it was not in writing as required by the statute of frauds and that the facts of this case do not support a finding that such agreement is excepted from the statute.

C. Adequacy of Damages

The second issue presented in this appeal is whether the trial court erred in failing to award the Sanderses a judgment for the loss of survey data stored on computers that remained at America One Property after the Sanderses' employment was terminated and they were barred from the premises. The Sanderses maintain that this data, apparently consisting of past client surveys, was retained by Mr. Davin and is most likely now lost or destroyed. The Sanderses assert that in the surveying business, "past surveying data is highly profitable in that such data generates numerous repeat customers and extensive business networking opportunities." They point out that the only

evidence presented as to the value of this property was Mr. Sanders' testimony estimating its value to be \$80,000 based upon that the fact that there were four years worth of completed surveys in the lost data and his experience that each year's worth of completed surveys generates about \$20,000 in repeat business every year. The Sanderses argue that Mr. Sanders' evaluation of the data was well reasoned and based upon his experience and expertise as a surveyor. The Sanderses also contend that as the owner of this property, Mr. Sanders was well qualified to testify as to its value. The Sanderses argue that although a trial judge is not required to accept a party's own evaluation of his or her property, the trial court's decision to award nothing to compensate the Sanderses for the loss of this data is contrary to the evidence and that even one of Mr. Davin's own witnesses admitted that the data was a valuable resource that could be used to generate income. The Sanderses insist that, given the evidence presented, the trial court erred in failing to award them \$80,000 for the lost data.

It is well settled that the party seeking damages has the burden of proving them. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999). Further, evidence as to the amount of damages must be "such as to lay a foundation enabling the triers of the facts to make a fair and reasonable assessment of the damages." *Wilson v. Farmers Chem. Ass'n*, 444 S.W.2d 185,189 (Tenn. Ct. App. 1969); *BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W.3d 229 (Tenn. Ct. App. 2006). In its memorandum opinion, the trial court noted that it found Mr. Sanders's estimate of the survey data to be "a sort of guesswork." The necessary implication of this finding and the trial court's denial of any compensation for the loss of this property is that the trial court determined that it had not been presented with sufficient evidence to enable it "to make a fair and reasonable assessment of the damages." As noted above, a trial court is in the best position to determine a witness's credibility. As we have also noted in the past, expert testimony, even if uncontradicted, is purely advisory and the trier of fact may retract it and arrive at a different conclusion if it finds such testimony to be unreasonable. *England v. Burns Stone Co., Inc.*, 874 S.W.2d 32 (Tenn. Ct. App. 1993); *Keith v. Howerton*, No. E2000-02703-COA-R3-CV, 2001 WL 984913, at *9 (Tenn. Ct. App. E.S., filed Aug 28, 2001); *see also Ford Motor Co. v. Taylor*, 446 S.W.2d 521, 530 (Tenn. 1969) (holding that the trial court has "the power and duty to estimate the fair compensation due plaintiff without being bound to accept the exact amount proposed in the testimony of any particular witness"). Although the lost data may have been of some value, without what the trial court considered to be reliable evidence that would have enabled it to make a fair assessment of damages, the trial court did not err in failing to grant the Sanderses compensation for such property.

IV. Conclusion

For the reasons stated herein, the judgment of the trial court is affirmed. Costs of appeal are assessed to the appellants, Landair Surveying Company of Tennessee, Inc.; Robert D. Sanders, Jr.; and Amy Sanders, for which execution may issue if necessary.

SHARON G. LEE, SPECIAL JUDGE

